

applicants, including small businesses, [and] rural telephone companies. . . .

Congress recognized that the competitive bidding process could have the effect of favoring only those with "deep pockets," which would, in turn, favor incumbents with established revenues at the expense of new companies or start-ups. Id. In adopting Section 309(j), Congress wanted to "ensure that small businesses will continue to become Commission licensees, and ensure that the adoption of the competitive bidding provisions. . . will not have the effect of excluding small businesses from the Commission's licensing procedures." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 255.

These same concerns are addressed in Section 257 of the 1996 Act, which directs the Commission to eliminate market entry barriers for entrepreneurs and small businesses, and provides that it is the "National Policy" "to promote the policies and purposes of [the] Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity."⁶

Unfortunately, the DBS auction had the very effect that Congress sought to avoid in passing § 309(j). TelQuest could not compete with the MCIs of this world for the last U.S. orbital slot. In fact, because of the enormous size of the winning bid for the space station license that will use this slot, not one new company or start-up company was in a position to bid, or even participate in the DBS auction. Contrary to Congress's design, only the "deep pockets" could bid for this spectrum. Because of these impediments, TelQuest was forced to be extremely innovative if it

⁶ Pub. L. No. 104-104, 110 Stat. 56, § 257(b).

wanted an opportunity to compete in the U.S. DBS market.⁷ Through the above-captioned applications, it has found a way to do so. TelQuest's efforts should not be thwarted, or even delayed, simply because Petitioners do not want an additional competitor in the U.S. DBS market. Rather, the Commission should rectify the barrier

⁷ TelQuest strongly objects to MCI's characterization of TelQuest as Bell Atlantic's and NYNEX's "trojan horse." In the letter from Bell Atlantic, attached hereto as Exhibit 5, Bell Atlantic and NYNEX informed TelQuest that they were not interested in directly investing in TelQuest. Bell Atlantic and NYNEX (collectively "BANX") have warrants to purchase 45% of CAI Wireless Systems, Inc. CAI, in turn, has an option, which expires in June 1996, to purchase a 15% ownership interest in TelQuest. TelQuest is in negotiations with other entities in which Bell Atlantic and/or NYNEX also have a minority interest or warrants. Moreover, even if fully consummated, the most significant ownership interest Bell Atlantic and NYNEX could have, directly or indirectly, in TelQuest would be 7% on a fully-diluted basis.

In any event, the Commission previously has recognized that permitting large companies to invest in small businesses further fulfills its statutory mandate under § 309(j) to ensure that licenses are awarded to a "wide variety of applicants, including small businesses. . . ." For example, in adopting rules to award broadband PCS licenses to small businesses, the Commission acknowledged that the lack of access to capital is the primary impediment to participation by small businesses in spectrum-based services. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report & Order, 9 FCC Rcd 5532 ¶¶ 93-112 (1994). As a result, the Commission outlined the types of permissible large company investments that would not negate an entity's designation as a "small business." In the C block PCS auction, a small business could obtain investment representing up to 75 percent of its passive equity from large companies as long as each investor held no more than a 25 percent passive equity interest. 47 C.F.R. § 24.709(b)(3). The interest that Bell Atlantic and NYNEX could have in TelQuest is far below such level.

Moreover, recognizing the procompetitive effects that could result from the influx of capital into the multi-video programming market, the Department of Justice waived the cross-ownership ban on the Bell Operating Companies ("BOC") for in-region MMDS service in August 1995. While the BOC's investment in the wireless cable industry has provided financial support for the wireless cable industry, the grant of TelQuest's applications would allow the wireless cable industry to become a viable competitor in the multi-video programming market.

to entry created by the DBS auction by allowing TelQuest to be a viable competitor in the U.S. market using a Canadian satellite.

Lastly, but most importantly, the U.S. public wins by a Commission grant of the TelQuest applications. As the Commission already recognizes, TelQuest's proposed wholesale DBS will offer "substantial efficiencies" and "promote the competitive position of DBS providers."⁸ These benefits will be passed on directly to U.S. consumers.

Competition will drive down the price of distribution of multi-video programming, increase consumer choice, and allow consumers to receive the advantages of ongoing technological advancement. The numerous letters by small U.S. businesses, consumer groups and industry groups in support of TelQuest's applications corroborate this position. These letters are attached hereto as Exhibits 1 and 6.⁹

⁸ Dominion Video Satellite, Inc., Report and Order, FCC 95-507 (Rel. Dec. 15, 1995), slip op. at 47.

⁹ For example, WCA stated that TelQuest's application "would benefit the wireless cable industry and competition in the multichannel video marketplace generally [and] would further serve the public interest by advancing the Commission's statutory mandate to foster small business participation in the communications industry." WCA Letter, attached hereto as Exh.1. Similarly, Gary Frink, President of the Television Viewers of America stated that "more competitors [are] almost always a good thing for consumers [and because] [t]here is a limited amount of spectrum available for use . . . [t]he more companies that occupy that spectrum the better." Letter to William F. Caton from Gary Frink, April 26, 1996, attached hereto as Exh. 6.

II. DISCUSSION

A. UNLIKE PETITIONERS, TELQUEST IS NOT USING THE FCC REGULATORY PROCESS TO LEVERAGE ITS NEGOTIATING POSITION IN CANADA.

EchoStar accuses TelQuest of trying to gain leverage in its negotiations in Canada. EchoStar Petition at 6. EchoStar claims that the Commission's rules require evidence of a firm agreement between TelQuest and a Canadian satellite operator and the establishment of the necessary authorizations by the Canadian government. Id. at 5-6. Echostar's argument is wrong on both counts.

First, such information is not necessary for the approval of TelQuest's earth station applications. Nevertheless, TelQuest's applications do describe its agreement with Telesat Canada to use transponders on a high-powered satellite to be located at 91° W.L. See TelQuest Applications. Additional information regarding the background and terms of this agreement is more fully described in the attached Declaration of Jared Abbruzzese, attached hereto as Exhibit 3.¹⁰

Second, in claiming that TelQuest must prove that Telesat has received the required Canadian government authorizations, EchoStar is merely attempting to answer the proverbial "chicken or the egg" argument. When proceeding in a venture where the approval of two governments is necessary, one government invariably must act first. In this case, Industry Canada has taken the lead. It has agreed to authorize Telesat Canada to operate satellites at the 91° W.L.

¹⁰ See also Letter from Telesat Canada to Acting Secretary William F. Caton, dated May 6, 1996, in support of TelQuest's applications, attached hereto as Exhibit 15.

Canadian DBS orbital position, subject to certain conditions. Exh. 1 to TelQuest Applications.¹¹ In fact, as MCI acknowledged in its Petition to Deny, the Canadian government has shown its support for Telesat's efforts by submitting its request to modify the ITU's Region 2 BSS plan.¹²

TelQuest is in no way attempting to leverage itself in negotiations with Telesat. To the contrary, it was in reliance on and pursuant to its agreement with Telesat and the conditional approval from Industry Canada that TelQuest not only filed the instant applications with the FCC, but also entered into partnerships with a number of wireless cable operators, and commenced the acquisition of DBAC.¹³ See Abbruzzese Decl., Exh. 3. Furthermore, even if the FCC does grant TelQuest's earth station licenses, it is not the Commission's consent that binds Telesat to honor its agreement with TelQuest, but the agreement itself.

EchoStar's claims regarding TelQuest's motives are not only without merit, but ironically more appropriately apply to the efforts of EchoStar and MCI to interfere with TelQuest's business arrangements in Canada. Specifically, it has come to TelQuest's attention that EchoStar is currently using its grant of FCC approval to launch a satellite to its 119° W.L. orbital position to

¹¹ Failure to Communicate, THE FINANCIAL POST, April 15, 1996, attached hereto as Exhibit 7.

¹² MCI's Petition at 32; see also Canada Seeks Changes in ITU Broadcast Satellite Plan for Americas, SATELLITE WEEK, April 19, 1996, attached hereto as Exhibit 8.

¹³ In fact, Telesat reviewed and made revisions to TelQuest's applications before TelQuest filed them with the FCC. See Abbruzzese decl., Exh. 3.

obtain leverage in negotiations with Telesat and with a Canadian DTH licensee, ExpressVu.¹⁴ Due to the failure of Anik-E1, the Canadian government desires as early a launch date as possible for ExpressVu. The FCC has authorized EchoStar to launch its satellite to 119° W.L., not to 91° W.L. It is EchoStar that is abusing the FCC's processes by using its DBS construction permit for 119° W.L. to leverage its own negotiations with Telesat and to delay the entrance of a new competitor in the DBS marketplace that will utilize the 91° W.L. orbital position.¹⁵

EchoStar is not alone in its efforts to use FCC authority and procedures to obstruct the agreement between TelQuest and its Canadian partner. MCI has also been abusing the regulatory process to protect its market position. As recently as the week of April 22, MCI contacted TelQuest to suggest that if TelQuest agreed to seek a delay in the processing of the instant applications, MCI would be able to leverage itself to a better bargaining position with TCI in an alternative deal which would include TelQuest. MCI offered to refrain from filing a petition to deny TelQuest's applications if TelQuest agreed to this bargain. Abbruzzese Decl., Exh. 3. Clearly, such a request for delay to satisfy MCI's motives would have been an improper use of FCC processes. Finally, MCI Chairman Bert Roberts himself showed the company's true desire to obstruct competition when he went to Canada the weekend of April

¹⁴ Abbruzzese Decl., Exh. 3; see also Nader Group Urges U.S. Control of Telesat Signals, FINANCIAL POST, April 18, 1996, attached hereto as Exhibit 9.

¹⁵ It appears that EchoStar may be planning to use the 119° W.L. orbital position temporarily to provide service to both Canada and the U.S., but ultimately wants to take control of the Canadian 91° W.L. orbital position.

20, 1996 to initiate discussions with BCE, Inc., through Alouette Telecommunications, Inc., owns a majority interest in Telesat, concerning the 91° W.L. orbital slot.¹⁶

As indicated in MCI's own April 25, 1996 press release, attached hereto as Exhibit 11, TelQuest's opponents include "one of the world's largest and fastest growing diversified communications companies . . . [w]ith annual revenue of more than \$15 billion . . ." [MCI] and "one of the world's largest media companies [News Corporation]."¹⁷ TelQuest is also being opposed by the entrenched DBS incumbents represented by EchoStar, DIRECTV and its partners, AT&T and USSB, and AlphaStar. In addition, MCI and AT&T together dominate the long distance market. Their efforts to prevent TelQuest's entrance into the DBS marketplace simply represent an extension of their oligopolistic behavior. In fact, Susan Mayer, President of News Corp./MCI's new SkyMCI recently admitted to MCI's plan to obstruct new entrants when she stated that "blocking use of the Canadian channels is critical" to the success of MCI's new SkyMCI DBS venture. See Going For It In DBS, BROADCASTING & CABLE, April 29, 1996 at 6-7, attached hereto as Exhibit 12.

In all, these Petitioners present a vivid contrast to TelQuest's small entrepreneurial business and provide additional evidence that these opponents are indeed motivated by their desire to protect the U.S. DBS market from vigorous competition.

¹⁶ Abbruzzese Decl., Exh. 3; According to Satellite Business News, "[s]ome sources suggested [MCI/News] simply reminded the company of their political clout in the United States, particularly at the FCC." MCI Complicates Canadian DBS Picture, SATELLITE BUSINESS NEWS, April 22, 1996, attached hereto as Exhibit 10.

¹⁷ MCI Communications Corporation April 25, 1996 Press Release, attached hereto as Exh. 11.

B. GRANT OF TELQUEST'S APPLICATIONS ARE CONSISTENT WITH COMMISSION RULES AND POLICIES.

Several Petitioners contend that TelQuest's applications should be subject to the Commission's DBS rules. In addition, several Petitioners argue that TelQuest's applications are incomplete and that it has failed to demonstrate its legal, technical and financial qualifications. These arguments lack merit.

1. TELQUEST'S APPLICATIONS ARE NOT SUBJECT TO THE COMMISSION'S DBS RULES FOR SPACE STATIONS.

Several Petitioners erroneously suggest that TelQuest's applications represent an effort to circumvent the Commission's DBS rules.¹⁸ TelQuest's applications are wholly consistent with the Commission's existing rules and policies.

From the inception of the Part 100 DBS rules in the early 1980s, the Commission has always conceptualized a DBS system as an entire package including uplink authority, satellite authority, and downlink/receive authority. The main focus of the DBS rules, however, has been the authority to operate a U.S. space station in a U.S. orbital slot. TelQuest, however, is a U.S. Company that wants to use a space station licensed by Canada in a Canadian orbital slot to provide a U.S. DBS service. Thus, TelQuest's applications do not fit neatly within the framework of the Part 100 rules.

For example, the Part 100 due diligence requirements speak only to satellite contracting and construction requirements.¹⁹ The

¹⁸ EchoStar Petition at 9, MCI Petition at 26-27, DIRECTV Petition at 4-5.

¹⁹ See 47 C.F.R. § 100.19.

recent rewrite of the DBS rules, though "designed to better reflect the realities of the service as it has evolved to date,"²⁰ focused almost solely on the allocation of orbital slots.²¹ In addition, the Commission recently proposed to treat DBS licensees as satellite space station licensees for 1996 regulatory fee purposes.²²

TelQuest's proposal clearly falls outside the FCC's rules for DBS space stations. It is the Canadian government's authority, not that of the U.S., to regulate the construction and operation of space stations using Canadian orbital slots. Because TelQuest does not propose to use a space station that is under the Commission's jurisdiction, TelQuest does not need a DBS license under Part 100 of the Commission's rules. TelQuest merely needs authority to locate an uplink in the U.S. to reach the space station to be located at 91° W.L., and authority for its subscribers in the U.S. to use receive-only dishes that receive the signals retransmitted from those space stations.²³ Indeed, in light of the Region 2 BSS

²⁰ DBS Auction Order ¶ 1.

²¹ Id. ¶ 3.

²² Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Notice of Proposed Rule Making, MD Docket No. 96-84, FCC 96-158, (rel. Apr. 9, 1996) ¶ 41.

²³ TelQuest's \$265 filing fee is proper for a blanket authorization for its receive-only earth stations. EchoStar suggests that 47 CFR § 1.1105, Item 12(a), "appears to contemplate a per-station fee," (EchoStar Petition at 5), but offers no concrete support for this position. TelQuest's application was proper for a blanket authorization and the Commission has accepted it for filing. Should the Commission agree with Echostar's reading, this would be a proper case for the Commission to exercise its discretion to grant a waiver. TelQuest also takes issue with MCI's assertion that Western Tele-Communications, Inc. ("WTCI") position on the need for TVRO licenses is "contravened by the (continued...)"

Plan and the assignment of the 91° W.L. slot to Canada, it would be inappropriate for the Commission to regulate the use of the 91° W.L. orbital slot.

TelQuest, recognizing that its applications do not fall within the framework of the Commission's DBS rules, nevertheless has attempted to comply with the spirit of the Commission's DBS rules and intends to comply with any and all other DBS requirements that apply. For example, consistent with the requirements of Section 100.53(b) of the Commission's rules, TelQuest intends to make service available in Alaska and Hawaii to the extent it is technically feasible from the space stations to be located at 91° W.L.²⁴ TelQuest will also comply with Section 25 of the 1992 Cable Act.²⁵ Thus, TelQuest submits that its applications fully comply with the Commission's existing rules and policies and the grant of its applications would serve the public interest convenience and necessity.

2. TELQUEST IS LEGALLY, TECHNICALLY AND FINANCIALLY QUALIFIED TO PROVIDE ITS PROPOSED SERVICE AND HAS PROVIDED ALL NECESSARY INFORMATION.

DIRECTV argues that TelQuest's applications should not be granted because TelQuest has failed to demonstrate its legal, technical, and financial qualifications.²⁶ Similarly, EchoStar

²³(...continued)

pendency of TelQuest's blanket license application." MCI Petition at 2. The Commission should bear in mind that there is no connection between TelQuest's application and WTCI's application, and the public interest questions posed by each are very different.

²⁴ See Abbruzzese Decl., Exh. 3.

²⁵ See DBS Auction Order ¶ 22.

²⁶ DIRECTV Petition at 4-5.

argues that more information is needed for the processing of TelQuest's applications.²⁷ DIRECTV's and EchoStar's contentions are without merit. TelQuest's applications contain all the information necessary for the Commission to grant the applications.

TelQuest particularly takes issue with DIRECTV's vague reference to the qualification information it believes TelQuest was required to submit with its applications. DIRECTV seems to suggest that TelQuest should have provided all the qualification information required of Part 100 applicants for space station construction permits. As discussed above, the DBS space station rules do not apply to TelQuest's applications because TelQuest proposes to use space stations authorized and regulated by Canada and located in a Canadian orbital slot. Thus, the qualification information required of applicants for a U.S. space station license are not applicable.

With regard to legal qualifications, the Part 100 space station rules address only those requirements related to alien ownership.²⁸ For earth station licenses, however, the Commission determines legal qualification based on the Form 430 Licensee Qualification Report,²⁹ which TelQuest included with its applications. As TelQuest's Form 430 establishes, TelQuest is U.S.-owned and therefore is legally qualified to provide DBS services in the United States.

²⁷ EchoStar Petition at 5.

²⁸ 47 C.F.R. § 100.11.

²⁹ See, e.g., Financial Satellite Corp., Memorandum Opinion, Order and Authorization, File No. CSS-85-004-P(LA) (rel. Jan. 15, 1986) (subsequent history omitted) ¶ 28.

The technical qualification requirements ensure that the Commission is able to prevent interference among radio frequency users and to maintain United States' control over radio emissions as required by statute.³⁰ Included in TelQuest's applications is complete information regarding the frequencies to be used, power levels, and the orbital slot to be used as the point of communication. In addition, TelQuest has retained frequency coordinators to assure its spectrum use will cause no interference to other users.³¹ Although EchoStar argues that additional information regarding the Telesat spacecraft and its Canadian regulatory status would be relevant,³² such information is not relevant to the Commission's determination of TelQuest's technical qualifications to construct and operate an earth station. Moreover, these interference issues will be thoroughly addressed by the ITU in connection with Canada's applications to modify the Region 2 BSS Plan to enlarge the footprint for the 91° W.L. orbital slot.

With respect to financial qualifications, the Part 100 DBS rules do not impose financial qualifications on applicants for a DBS license. Rather, the rules impose due diligence requirements, all of which relate to construction of a space station.³³ The purpose of the due diligence requirements is to ensure that the applicant has the resources to construct the proposed facility

³⁰ See 47 U.S.C. § 301.

³¹ See TelQuest applications at Exhibit 2.

³² EchoStar Petition at 5-6.

³³ 47 C.F.R. § 100.19.

within a reasonable time frame so that spectrum will not go unused.³⁴ Because TelQuest is not requesting a space station construction permit, this requirement does not apply.

Nevertheless, TelQuest assures the Commission that it has sufficient financial resources to construct the proposed uplink facility and to operate a viable competitive video distribution system. TelQuest's ability to do so is demonstrated in part by the success of its chairman and CEO in bringing competitive wireless cable service to the public through his other business venture, CAI Wireless Systems, Inc.³⁵

In sum, TelQuest's applications establish that TelQuest possesses the legal, technical, and financial qualifications necessary for the Commission to determine that a grant of TelQuest's applications would serve the public interest, convenience, and necessity.

C. THE U.S. DBS AUCTION RULES DO NOT APPLY
TO CANADIAN ORBITAL SLOTS.

MCI erroneously contends that approval of TelQuest's applications will contravene Commission policies pertaining to (1) the use of competitive bidding to assign DBS spectrum that will promote the rapid deployment of DBS services, as adopted in the DBS Auction Order and (2) the recovery for the public of a portion of

³⁴ See, e.g., Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rule Making, 10 FCC Rcd 1 (1995) ¶ 92; Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBS Petition for Declaratory Rulemaking Regarding the Use of Transponders to Provide International DBS Service, FCC 96-14, (rel. Jan. 22 1996) ("DISCO I") ¶ 40.

³⁵ See Abbruzzese Decl., Exh. 3.

the value of the public spectrum, as required under Section 309(j) of the Act. These arguments have no merit.

As a threshold matter, MCI fails to understand that the Commission's policies apply to United States spectrum only, not to Canadian spectrum. MCI espouses the view that "[i]f additional spectrum were to become available as a result of future adjustment in the Region 2 BSS Plan. . . [such] spectrum would likewise be subject to competitive bidding." MCI Petition at 10. However, MCI's interpretation of the Commission's competitive bidding policies is correct only to the extent that additional spectrum becomes available to the U.S. The Commission's DBS Auction Order does not apply to spectrum that becomes available in another country in Region 2. Thus, TelQuest's use of a Canadian orbital slot would not, as MCI suggests, be the equivalent of the Commission acquiring additional DBS spectrum through an adjustment to the Region 2 BSS Plan.

TelQuest also objects to MCI's implication that MCI was not aware that non-U.S. satellites might be used for domestic services. The Commission specifically referenced a forthcoming Notice suggesting these possibilities in four separate publications.³⁶ MCI participated in the Commission proceeding that adopted the DBS auction rules in which the Commission notified potential bidders that it is considering the delivery of DBS to the U.S. from foreign satellite positions. Arter & Hadden filed comments in response to

³⁶ Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, Notice of Proposed Rulemaking, 10 FCC Rcd 7789 (1995) ("Disco I NPRM"); DISCO I ¶ 5; DBS Auction NPRM ¶ 24; DBS Auction at n. 3. The forthcoming Notice typically is referred to as "DISCO II."

the Disco I NPRM stating that clients of the firm were interested in using a foreign DBS orbital slot to provide domestic service. The Commission warned prospective bidders to factor in the effect of permitting non-U.S. satellites to provide domestic service when calculating bids in the DBS auction.³⁷ It would be short-sighted for companies with the experience and resources of MCI and News Corp. to ignore such warnings and not to anticipate that some entrepreneur would make every effort to develop the ability to provide domestic service via a foreign orbital slot. In fact, TelQuest met with MCI prior to the auction and offered MCI a partnership in its plans to use the 91° W.L. orbital slot.³⁸

MCI was certainly well aware prior to bidding in the DBS auction that there was the potential that applications would be filed requesting landing rights for satellites located in a foreign DBS orbital slot. MCI must have factored this possibility into its bidding decisions. Thus, its objection to TelQuest's applications is blatantly anticompetitive.

Similarly, MCI contends that TelQuest's use of a Canadian DBS orbital slot somehow contaminates the Commission's earlier representations in the DBS Auction Order that 110° W.L. slot was the last full-CONUS slot available in the U.S. On the contrary, the Commission's representation is as true today as it was when the Commission issued the DBS Auction Order. MCI did obtain the last full-CONUS slot assigned to the U.S. TelQuest's applications, however, involve a U.S. company seeking authority to serve the U.S.

³⁷ See DBS Auction NPRM at 10.

³⁸ See, Abbruzzese Decl., Exh. 3.

market from a Canadian full-CONUS slot. Contrary to MCI's claims, the grant of TelQuest's applications would not permit TelQuest "to enter the U.S. market without paying anything for the right to do so."³⁹ MCI Petition at 11. The Canadian government fully intends to assess license fees for the use of the spectrum.⁴⁰

TelQuest submits that its participation in the U.S. DBS auction was not an option. Nor was TelQuest the only small company that lacked the financial resources to bid against the MCI/News Corp. joint venture. Indeed, there were only three bidders, all of whom are large, publicly-traded companies.⁴¹ It was only because TelQuest could not bid in the DBS auction for the last remaining U.S. full-CONUS slot that it vigorously pursued other options that would allow a startup company to compete in the DBS market against the well established and capitalized

³⁹ TelQuest also notes that EchoStar and DIRECTV received their full-CONUS slots for free.

⁴⁰ The U.S. government does not have the authority to assess additional licensing fees in connection with TelQuest's use of a Canadian DBS orbital slot. In Disco I, the FCC stated that it will not give independent enforcement under U.S. law of foreign regulation of U.S.-licensed DBS operators. When the Commission granted U.S. licensees authority to provide international DBS, foreign countries did not require the payment of additional fees for such use of U.S. DBS orbital slots. It would therefore be inconsistent for the United States to subject a United States company using a Canadian DBS orbital slot to U.S. licensing fees. For the U.S. to impose licensing fees on TelQuest would encourage foreign countries to levy fees on U.S. satellite licensees providing international DBS.

⁴¹ MCI also argues that a foreign satellite system should not be subsidized. There is no doubt that the Canadian government will garner licensing fees from the entities that are permitted to use the Canadian orbital slots. See Ottawa Considering Space-slot Auction, THE TORONTO STAR, April 17, 1996 at B3, attached hereto as Exhibit 13.

conglomerates. Surely MCI must remember the days when it was just beginning and had to be creative in order to compete with the AT&Ts of the world.

Moreover, although TelQuest may pay less than MCI paid in the DBS auction, its entrance into the DBS market will enable the Commission to fulfill its statutory mandate under Section 309(j) of the 1934 Act. One of the objectives of Section 309(j) is to "ensure" that licenses for spectrum are distributed to small businesses like TelQuest.⁴² The FCC struggled in the Auction NPRM for a way for small businesses to participate in the spectrum-based services that will use the DBS spectrum that was auctioned. Granting TelQuest's uplink applications provide a small business DBS solution for the Commission.

Lastly, granting TelQuest's applications will allow the customers of TelQuest's wholesale DBS service, such as wireless cable operators who have already paid \$216 million for licenses in the MDS auction, to realize the full value of their licenses. The grant of TelQuest's applications will create a vast array of additional business opportunities in the U.S. See Schmidt WCA Letter, Exh. 1. The creation of new business opportunities will in turn bolster the economy by creating more jobs and lower consumer prices. In short, TelQuest's use of a Canadian orbital slot to provide domestic service will increase revenues to the U.S. government rather than represent subsidization, as MCI suggests. MCI Petition at 13.

⁴² 47 U.S.C.A. 309(j)(3)(B).

D. POSTPONING THE GRANT OF TELQUEST'S APPLICATIONS
UNTIL AFTER THE COMPLETION OF THE DISCO II
RULEMAKING PROCEEDING IS NOT NECESSARY AND
WOULD PUT TELQUEST OUT OF BUSINESS.

Contrary to several Petitioners' claims, the Commission does not need to complete the upcoming DISCO II rulemaking proceeding before granting TelQuest's applications (see, e.g., Petitions of MCI, AT&T, EchoStar, and AlphaStar). First, the policy issues that will be addressed in the DISCO II proceeding are not relevant to the policy issue in TelQuest's applications. Second, it is within the Commission's discretion to proceed either by rulemaking or on a case-by-case adjudication in order to serve the public interest. Third, even if the Commission were to complete the DISCO II proceeding prior to its consideration of TelQuest's applications, any reciprocity tests that were adopted would not be relevant to the case at hand because of the lack of satellite capacity in the United States.

1. THE POLICY ISSUES IN TELQUEST'S APPLICATIONS
ARE WHOLLY SEPARATE FROM THE ISSUES TO BE
RAISED IN THE DISCO II PROCEEDING.

Such Petitioners erroneously contend that the issues raised in TelQuest's applications are the very same issues that the Commission intends to address in the DISCO II proceeding. See, e.g., EchoStar Petition at 3-5; AlphaStar Petition at 3-4. This contention is wholly without merit. TelQuest, a U.S. company, plans to construct an earth station in the U.S. that will allow it to communicate with satellites in a Canadian orbital position and then transmit U.S. programming to U.S. subscribers. TelQuest is not a foreign company to which foreign entry rules apply. Nor is TelQuest a Canadian company seeking to provide DBS service to the

U.S. Rather, TelQuest is a small U.S. company attempting to provide a new DBS service in the U.S. TelQuest's choice of Canadian hardware is no different than a U.S. telephone company using fiber optic cable manufactured in Germany to provide service to the U.S. Foreign reciprocity concerns do not apply. Denying TelQuest's applications would put a small U.S. company out of business (Abbruzzese Decl., Exh. 3) but would have much less impact on Canadian companies. The DISCO II proceeding, with its emphasis on entry by foreign entities, does not apply to TelQuest's applications.

Moreover, if the Commission delays consideration of TelQuest's applications pending completion of the DISCO II proceeding, TelQuest will not be able to obtain the financing necessary to implement its business plan. As evidenced in the attached declaration of TelQuest's chairman, Jared Abbruzzese, TelQuest's financing is contingent on its receipt of a license by this summer. TelQuest must begin to make capital contributions toward the construction of a satellite by this summer in order for Telesat to launch that satellite in 1997. To delay granting TelQuest's applications because of a rulemaking proceeding that does not directly address issues relevant to TelQuest's applications would be arbitrary and capricious. Such an outcome would directly contravene Congress's stated goals of promoting competition and small business participation by driving a small U.S. company out of business.

2. THE COMMISSION HAS STATUTORY AND REGULATORY
AUTHORITY TO GRANT TELQUEST'S APPLICATIONS
PRIOR TO COMPLETING THE DISCO II PROCEEDING.

Even assuming the Commission agrees with these Petitioners' claim that TelQuest's applications implicate the very same policy issues that will be addressed in DISCO II, the Commission is not precluded from considering TelQuest's applications immediately. It is a fundamental principle of administrative law that it is within the discretion of federal agencies to choose between rulemaking and case-by-case adjudication. NLRB v. Bell Aerospace Company Division of Texetron, Inc., 416 U.S. 267, 294 (1974), citing SEC v. Chenery Corp., 332 U.S. 194 (1947) and NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Thus, to the extent policy issues are raised, the Commission can address them in the context of TelQuest's applications.

The Commission also has clear statutory authority to consider TelQuest's applications prior to the completion of the DISCO II rulemaking proceeding. Section 7 of the 1934 Act states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." In addition, Section 7 directs the Commission to determine whether an application for a new service is in the public interest. Section 7 also provides that any party opposing the provision of a new technology or service has the burden of demonstrating that such proposal is "inconsistent with the public interest." The Petitioners have failed to show that TelQuest's plan to offer a wholesale DBS service that will enable numerous small video service providers to enter the U.S. market is "inconsistent with the public interest." 47 U.S.C. § 7.

TelQuest's new and innovative service is wholly consistent with the public interest. It will give the public the combined advantages of DBS and over-the-air television -- more than 100 channels plus local programming. TelQuest's new service will be provided at a low price by subsidizing it with interactive national advertising not available in the market today (Abbruzzese Decl., Exh. 3). In addition, TelQuest plans to offer this new service on a wholesale basis to numerous U.S. video service providers, such as wireless cable companies, small cable operators and independent local exchange carriers, who in turn will offer it to retail customers. The entrance of numerous small, entrepreneurial companies into the U.S. DBS market would advance not only the goals regarding new services enunciated in Section 7 of the 1934, but also would further Congress's goals set out in the 1996 Act by creating vibrant competition in the video marketplace and particularly by ensuring the participation of small U.S. businesses.

3. THE LACK OF CAPACITY ON U.S. SATELLITES
RENDERS IRRELEVANT ANY RECIPROCITY TEST
ADOPTED BY THE COMMISSION.

Even were the Commission to adopt a reciprocity test in DISCO II similar to the "Effective Competitive Opportunity" ("ECO") test adopted in Market Entry & Regulation of Foreign-Affiliated Entities, FCC 95-475 (rel. Nov. 30, 1995) ("Market Entry Order"), and even if the Commission determined that such a standard applied to a U.S. company like TelQuest, such an analysis would not apply

here because of the lack of satellite capacity in the U.S. market.⁴³ Despite several Petitioners' claims to the contrary (see, e.g., EchoStar Petition at 8; DIRECTV Petition at 8-10; MCI Petition at 28), there is a lack of satellite capacity in the United States. TelQuest officers and consultants personally contacted all current holders of domestic satellite capacity, and, as TelQuest advised the Commission in its applications, none of the satellite operators had capacity available that was suitable for TelQuest's needs.⁴⁴

Although EchoStar alleges that it was not contacted by TelQuest, TelQuest's Executive Vice President spoke on three different occasions with high-level officials at EchoStar about TelQuest's need for capacity.⁴⁵ At no point did EchoStar indicate that it would allow TelQuest to lease or own transponders to provide wholesale DBS service,⁴⁶ calling into question⁴⁷ the

⁴³ It also would be contrary to the public interest to invoke an ECO test where the strict application of such a test would prohibit the entry of a new wholesale DBS competitor and numerous retail DBS competitors in the U.S. market, all of whom are U.S. companies. Indeed, in the Market Entry Order, the Commission set out several public interest factors that could be weighed in favor of permitting foreign access to the U.S. market. One of those factors was "the general significance of the proposed entry to promotion of competition in global markets." Market Entry Order ¶ 56. TelQuest's venture would have a significant impact on competition in the U.S. market and would advance the Commission's statutory mandate to foster the involvement of small U.S. businesses in the communications industry. The public interest benefits clearly weigh in favor of granting TelQuest's use of Canadian hardware to provide a new and innovative wholesale DBS service to the United States.

⁴⁴ See Declaration of Barbara Sparks ("Sparks Decl."), attached hereto as Exhibit 14.

⁴⁵ Id.

⁴⁶ Id.

nature of EchoStar's own motives in filing its Petition, not TelQuest's motives.⁴⁸

In the face of this shortage of domestic capacity, combined with the unmet consumer demand for TelQuest's services,⁴⁹ TelQuest looked to a full-CONUS orbital position, the 91° W.L. slot allocated to Canada. The 22 transponders that Telesat has agreed to provide TelQuest are also insufficient for TelQuest to provide all of the programming it seeks to offer. However, this wholesale DBS capacity is all that TelQuest has been able to procure.

Historically, U.S. and Canadian satellite operators have frequently looked to one another in times of shortages of domestic satellite capacity. With respect to the fixed satellite service, this understanding has been memorialized in an Exchange of Letters between U.S. and Canadian officials.⁵⁰ The Commission has relied

⁴⁷(...continued)

⁴⁷ EchoStar Petition at 8.

⁴⁸ See supra Section II.A.

⁴⁹ Demand for TelQuest's DTH and HITS service is evidenced by commitments from wireless cable operators (see Abbruzzese Decl., Exh. 3) and significant support from other competitive MVPDs. See WCA Letter, Exh.1; Comments of Cable and Telecommunications Association, Exh. 6). TelQuest has been unable to meet this demand with existing, domestic DBS capacity, the Petitioners' claims notwithstanding. See MCI Petition at 28-30, DIRECTV Petition at 9, EchoStar Petition at 8.

⁵⁰ Exchange of Letters of November 6, 1972, by Bertram W. Rein, Deputy Assistant Secretary for Transportation and Communications, U.S. Department of State, with K.B. Williamson, Minister of the Embassy of Canada at Washington, and F.G. Nixon, Administrator, Telecommunications Management Bureau, Canadian Department of Communications, Dept. of State Bulletin, Vol. LXVIII, No. 1754 at 145-48. See also, Exchange of Letters of August 24, 1982, by Allan Gottlieb, Ambassador of Canada, with Robert D. Mormats, Assistant Secretary for Economic and Business Affairs, U.S. Department of State.

on the Exchange of Letters on numerous occasions to authorize use of Canadian fixed satellites for U.S. domestic service.⁵¹

Although the issue at hand does not involve the use of a fixed satellite service, these cases demonstrate the Commission's determination that the public interest is served by the use of Canadian satellites to meet consumer demand that cannot be fulfilled with domestic satellite capacity. Here, the public interest would be served by allowing TelQuest to utilize a Canadian DBS orbital slot to provide its competitive service.⁵²

MCI and AT&T, however, suggest that the Exchange of Letters cannot form the foundation for a public interest determination regarding TelQuest's use of a Canadian DBS orbital slot because the Exchange of Letters envisioned a temporary shortage of U.S. capacity.⁵³ While the Commission generally has placed time limits

⁵¹ See, e.g., National Broadcasting Co., Inc., 9 FCC Rcd 557 (Int'l Fac. Div. 1994); Chevron Indus., Inc., 8 FCC Rcd 2726 (Dom. Fac. Div. 1993); GTE Satellite Corp., 90 FCC 2d 1009 (1982), recon. denied, 94 FCC 2d 1184 (1983); American Satellite Corp., 40 FCC 2d 656 (1973). See also Hughes Communications, Inc., et al., 90 FCC 2d 1238 ¶¶ 35-36, n.32 (1982).

⁵² MCI erroneously alleges that the Exchange of Letters' criteria are not met because no spacecraft is currently located in the 91° W.L. slot. MCI Petition at 30-32. TelQuest need not wait for the launch of a satellite into the Canadian DBS orbital slot to determine the status of satellite capacity in the United States. In addition, TelQuest has received assurances from Telesat that capacity will be available on a satellite in the Canadian slot by the time TelQuest can roll out its service in late 1996. See Abbruzzese Decl., Exh. 3. As discussed above, no U.S. DBS capacity will become available to TelQuest in the foreseeable future. See Sparks Decl., Exh. 14.

⁵³ MCI Petition at 29; AT&T Petition at 7. Also, AT&T seems to suggest that the Exchange of Letters and subsequent Commission precedent only support use of Canadian satellites when the shortage is temporary and incidental. This is inconsistent with the Letters themselves and the precedent discussed above, all of which presents the two circumstances in the alternative, i.e., use of Canadian facilities is in the public interest if either condition is met.

on the use of a foreign-owned satellite, it typically has done so only where a domestic alternative was expected to be available within a few years.⁵⁴ However, in Chevron Industries, Inc.,⁵⁵ no time limit was imposed, and it was not alleged that a domestic alternative would become available. TelQuest seeks authority to communicate with a satellite that will not be wholly-owned by a foreign company, as TelQuest will own 22 out of the 32 transponders available on the satellite. Here, there is a clear lack of domestic satellite capacity and there is no evidence that domestic capacity will become available in the foreseeable future. Thus, TelQuest's applications should be granted.⁵⁶

DIRECTV, on the other hand, argues that a lack of available U.S. DBS spacecraft does not constitute a lack of capacity because other, non-satellite delivery sources must also be considered.⁵⁷ TelQuest's DTH and wholesale DBS services cannot be provided except on digital transponders on a DBS satellite. As set out above, no such domestic facilities are available to TelQuest. DIRECTV also argues that TelQuest should have considered Latin American satellite capacity. Given DIRECTV's general objection to TelQuest's use of a foreign DBS orbital slot, it is unclear why

⁵⁴ See supra n. 51.

⁵⁵ Chevron Industries, Inc., 8 FCC Rcd 2726 (Int'l Facs. Div. 1993).

⁵⁶ It is disingenuous for MCI to dispute the lack of domestic satellite capacity (MCI Petition at 30) and at the same time complain that its recent auction bid was explicitly premised on the Commission's characterization of MCI's orbital slot as the "last available location ... capable of nationwide service." MCI Petition at 4-5, 10-11.

⁵⁷ DIRECTV Petition at 9.